1990

State of Utah v. Michael Anthony Archuleta : Petition for Rehearing

Utah Supreme Court

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Jan Graham; Utah Attorney General; Attorney for Plaintiff-Appellee.

BRIEF

NO. 900041

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IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Appellee,	:	
	:	
vs.	:	
	:	Case No. 900041
MICHAEL ANTHONY ARCHULETA,	:	
	:	
Defendant-Appellant.	:	

APPELLANT'S PETITION FOR REHEARING

APPEAL FROM A FINAL JUDGMENT OF CONVICTION
IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
THE HONORABLE GEORGE E. BALLIF, DISTRICT JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

Cases

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IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff-Appellee, vs. MICHAEL ANTHONY ARCHULETA, Defendant-Appellant.	:	Case No. 900041

JURISDICTION OF THE COURT

This appeal is from the jury verdict of guilt and judgment of death imposed upon Appellant following a jury trial and penalty hearing. This court has jurisdiction pursuant to the provisions of Utah Code Annotated, §78-2-2(3)(i).

STATEMENT OF THE ISSUES

Was there sufficient evidence in the record to justify the failure of the trial court to make specific findings on the issue of whether or not the Appellant made a knowing and intelligent waiver of his Miranda rights?

Did the error of the court in giving a supplemental instruction which invalidated a statutory aggravating circumstance require reversal of Appellant's death penalty conviction?

STATEMENT OF THE CASE

This Petition for Rehearing is filed pursuant to Rule 35 of the Utah Rules of Appellate Procedure in reference to that Opinion of this Court filed on the 25th day of March, 1993, affirming the conviction and death penalty imposed upon the Appellant.

STATEMENT OF THE PROCEEDINGS

This is an appeal from the verdict and sentence imposed upon the Appellant in the Fourth Judicial District Court in and for Utah County, State of Utah, and from the decision of the Honorable George E. Ballif, District Judge, in denying Appellant's Motion to Suppress Evidence.

STATEMENT OF FACTS

Appellant relies upon his Statement of Facts set forth in his brief on appeal and in his reply brief. Appellant has set forth additional facts in each of the arguments which follow.

ARGUMENTS

POINT I

THERE IS NOT SUFFICIENT EVIDENCE IN THE RECORD TO JUSTIFY THE FAILURE OF THE TRIAL COURT TO MAKE SPECIFIC FINDINGS ON THE ISSUE OF WHETHER OR NOT THE APPELLANT MADE A KNOWING AND INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS.

This Court noted the failure of the trial court to make specific Findings of Fact and Conclusions of Law concerning the issue of the knowing and intelligent waiver required by the United States Supreme Court in Edwards v. Arizona, 451 U.S. 476. The court has taken the position that the court may "search the record" for grounds upon which the findings of the trial court can be upheld. The court in the majority opinion cited as evidence that

the Appellant had "made several phone call during the course of the interview and was provided with food and refreshments." The court also cited the statement of Lt. Hulet indicating that the Appellant had indicated that he understood the Miranda warnings when given at the outset of Hulet's interview with the Appellant and Hulet's observation that the Defendant "seemed to be in good health and did not appear to be under the influence of drugs or alcohol."

A review of the transcript of the testimony of Officer Richard Dickinson given at the hearing on the Motion to Suppress the witness indicates that he was present during the interview of the Appellant with Lt. Hulet (Trans. Hearing 10\16\89 p.145), that the interview was interrupted by a telephone call for Lt. Hulet after which Appellant refused to talk to Hulet (Trans. Hearing 10\16\89 p. 148), that the Appellant then talked to Dickinson for 20 minutes after again being advised of his Miranda rights (Trans. Hearing 10\16\89 p.149), after which the Appellant requested a telephone call to his family. Dickinson did not allow the call until he had cleared it through Hulet and the director (Trans. Hearing 10\16\89 p.149). Dickinson further testified that the Appellant made no requests for food or water during the interview nor for anything else other than the one telephone call (Trans. Hearing 10\16\89 p. 150).

Although Lt. Hulet testified that the Appellant made several telephone calls to his parents, he also testified that the calls were made in the presence of Officer Dickinson (Trans. Hearing 10\16\89 p. 102). As set forth above, Dickinson indicated only one

telephone call which allowed after both his and Hulet's interrogation of the Appellant.

Although the officers testified that the Appellant indicated that he understood his rights, the facts do not support a conclusion that he was in a condition and state of mind to knowingly and intelligently waive those rights. Lt. Hulet testified that "At first Mr. Archuleta's statement was confusing. He jumped around a lot. But after about 30 minutes, Mr. Archuleta became calmer, and he was able to relate most of his involvement." (Trans. Hearing 10\16\89 p. 98).

During cross examination, Hulet responded as follows:

Q You indicated in your testimony in direct examination that Mr. Archuleta was quite--

Let's see how you put it here: Confusing when he first started talking to you.

Is that right?

A I said that he was confusing. He jumped around a lot.

Q Didn't make a lot of sense?

A Not at first.

Q Took about 30 minutes for him to calm down?

A Right.

Q That would be during the time that you advised him of any Miranda right he may have; is that correct?

A I would assume, yes. (Trans. Hearing 10\16\89 p. 106-107)

Appellant submits that the record does not support the conclusion that the Appellant was in a mental state to voluntarily and intelligently waive the Miranda rights given the confused state of mind, the length of time of incarceration without counsel (39 hours), and the indication that he was going "crazy" unless he talked to someone. (Trans. Hearing 10\16\89 p. 144) Appellant submits that this factual situation is similar to that considered by the United States Supreme Court in Sims v. Georgia, 389 U.S. 404 in which the court found a lack of knowing and intelligent waiver.

In footnote 18 to the opinion of the court, the court notes that although the Utah Rules of Civil Procedure, Rule 52(a), requires specific findings and to separately state their Conclusions of Law on all material issues, that under the ruling of the court in Allen v. Prudential Property & Casualty Ins. Co., 839 P.2d 798, the court may "search the record for grounds upon which they may be upheld." Citing Allen at 839 P.2d 800. The opinion in Allen stated that the failure to comply with Rule 52(a) alone would not be reversible error absent unusual circumstances. Allen, 839 P.2d at 801. Appellant contends that where constitutional rights of the magnitude of those asserted in this matter and in a capital homicide case, there should be a requirement that the court follow all of Rule 52(a) in order that this court can adequately review the reasoning and considerations of the lower court to ensure the proper application of constitutional principles.

POINT II

THE ERROR OF THE COURT IN GIVING THE SUPPLEMENTAL INSTRUCTION INVALIDATING A STATUTORY AGGRAVATING CIRCUMSTANCE REQUIRES A REVERSAL OF THE APPELLANT'S DEATH SENTENCE.

Although the court in this matter found error in the giving of the supplemental instruction to Instruction No. 13 and that the effect of said error was the invalidation of a statutory aggravating circumstance, the court went on to determine that the consideration of the flawed circumstance did not require reversal of Defendant's death sentence. The court then undertook a review to determine whether or not the jury's consideration of the flawed circumstance was harmless error in this case.

Appellant submits that in a death penalty case, the appellate court should not substitute its judgment for that of the jury or engage in speculation as to the effect that aggravating or mitigating factors may have on a particular jury. This court has previously found the process of weighing the aggravating factors and mitigating factors to be "inherently imprecise." In State v. Holland, 777 P.2d 1019, the court stated:

> In reality, there is no real weighing process; the factors that are evaluated and "weighed," or balanced against each other as mitigating and aggravating circumstances, are not, in truth, weighable, as are physical items that have mass and can be compared in the pans of a scale. These factors have largely subjective value and therefore vary in their "weight" or persuasiveness for or against the death penalty with each judge or juror according to his or her own background and prior experiences. 777 P.2d at 1028.

In the Holland case, the court found that the trial court had committed error in not applying proper sentencing procedures. However, the court did not engage in a review of the aggravating

and mitigating factors to determine whether or not the court would have imposed the death penalty had the proper procedure been followed. In State v. Wood, 648 P.2d 71, this court held that it is essential in a capital sentencing proceeding that the sentencing authority consider only proper aggravating circumstances. Further, the court reasoned that it is the sentencing authority, in this case, the jury, who must be convinced beyond a reasonable doubt as to appropriateness of the death penalty.

Appellant submits that it is pure speculation for an appellate court to "weigh" the effect of the improper consideration of an aggravating factor in this case. The court places great weight upon the "atrocious and depraved nature" of the torture and murder of the victim which would logically indicate that the jury should have had no difficulty in returning a verdict of death. However, the jury in the present case deliberated for over six (6) hours in the penalty phase before reaching a verdict. (T. 3741) Further, the jury in the companion case of State v. Lance Wood, considered the same aggravating factors, the same "atrocious and depraved" torture and murder and failed to return a verdict of death. Granted, as the court has observed in denying Appellant's argument for proportionality, there was a different defense attorney, the background of the Defendants were different in some respects, and the jury was different. However, the same factors the court cites as aggravating in this case were also present in the co-defendant's case. Lance Wood had previous felony convictions and he was on parole at the time of the commission of the offense. The

differences in the individuals background included the fact that Appellant was hispanic and Catholic while Wood was white and Mormon. (Addendum, Exhibits A & B)

The court cited the factors which the court considered to have been presented in mitigation and which the court found to have been "outweighed" by the aggravating factors. However, the court did not consider several additional mitigating factors which Appellant suggests should have been considered in the court's analysis. First, there was substantial evidence that the sequence of events was began by the co-defendant Wood. Wood had the knife and as the curative instruction of the court stated, the prosecution's theory of the case was that Wood cut the victim which began the series of events leading to the death of the victim. The testimony of the Defendant is consistent with that theory. There was evidence from which the jury could have determined that the Appellant was more of an aider and abettor in some or all of the crimes of which he was convicted. This factor would obviously be a mitigating factor. There was substantial evidence from the State's witnesses as well as from the Defendant's testimony that Defendant had consumed a large quantity of alcohol. (T. 2049-2051, 3230) In addition to the fact that the Defendant suffered from a mental illness which was cited by the court as a mitigating factor, there was the additional factor of the effect of alcohol upon the Defendant. Dr. Howell, a forensic psychologist, testified that the particular mental illness of the Defendant would be affected by alcohol and that his judgment would be additionally impaired. Dr. Howell also stated that

individuals suffering from the mental illness which he found present in the Defendant were immature, suggestible and tended to be followers. (T. 3650) Further, there was evidence from Dr. Howell that the Defendant could recognize right from wrong, but because of his impairment mentally, would have impairment in choosing right. (T. 3677)

Additionally, the age of the Defendant was a mitigating factor, especially if considered in terms of his maturity as affected by the mental illness set forth above.

Although the Defendant had two (2) prior convictions for felonies, those convictions are somewhat mitigated by the fact that neither was a crime of violence.

Appellant submits that the court is not in a position to properly review and weigh the factors which entered into the deliberations and decision of the individual jurors. The only reasonable remedy to the error found by the court would be to reverse the death penalty of the Appellant and impose a life sentence, or to remand for a new penalty hearing.

CONCLUSION

Appellant requests that the court grant his Petition for Rehearing for the reasons set forth above. This case is one of serious import, not only for the Appellant, but also as authority for the court to impose its judgment on issues which should be determined by a jury, which has been properly instructed in the law. Appellant requests such rehearing, because this decision

appears to be in conflict with the previous decisions of this court in cases such as State v. Holland, 777 P.2d 1019.

Dated this 22 day of April, 1993.

MICHAEL D. ESPLIN
Attorney for Appellant

CERTIFICATION

Pursuant to the provisions of Rule 35 of the Utah Rules of Appellate Procedure, the undersigned counsel for Petitioner/Appellant hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

MICHAEL D. ESPLIN
Attorney for Petitioner/Appellant

STATE OF UTAH)
)ss.
COUNTY OF UTAH)

On the 22nd day of April, 1993, personally appeared before me Michael D. Esplin, the signer of the foregoing Certification, who duly acknowledged to me that he executed the same.

NOTARY PUBLIC

NOTARY PUBLIC
JACKIE T. BRADY
43 East 200 North
Provo, Utah 84606
My Commission Expires. 4-9-94
State of Utah

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 22nd day of April, 1993, four (4) copies of the foregoing Petition for Rehearing to the following:

Charlene Barlow
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

ADDENDUM

Utah Code Annotated, §78-2-2(3)(i)

Utah Rules of Appellate Procedure, Rule 35

Utah Rules of Civil Procedure, Rule 52(a)

Exhibit "A" - Record Card for Lance Conway Wood

Exhbiti "B" - Record Card for Michael A. Archuleta

(2) On January 1, 1992, the circuit courts in the Fifth, Sixth, Seventh, and Eighth Districts are established as district courts in those municipalities where the circuit courts currently are located. Circuit court judges of these judicial districts shall be district court judges as of that date. Judges of these districts shall stand for unopposed retention election as required by law.

(3) The authority of the Judicial Council to replace a vacant circuit court judicial position with a court commissioner position within the limits established under Subsection (1) shall expire January 1, 1996.

1991 (2nd S.S.)

78-1-3. Effect of act on election functions.

(1) Any justice or judge of a court of record whose election to office was effective on or before July 1, 1985, shall hold the office for the remainder of the term to which he was elected. The justice or judge is subject to an unopposed retention election as provided by law at the general election immediately preceding the expiration of the respective term of office.

(2) Any justice or judge of a court of record whose appointment to office was effective on or before July 1, 1985, is subject to an unopposed retention election as provided by law at the first general election held more than three years after the date of the appointment.

(3) Any justice or judge of a court of record whose appointment to office was effective after July 1, 1985, is subject to an unopposed retention election as provided by law at the first general election held more than three years after the date of the appointment.

1988

CHAPTER 2

SUPREME COURT

Section

78-2-1 Number of justices — Terms — Chief justice and associate chief justice — Selection and functions

78-2-1.5, 78-2-1.6 Repealed

78-2-2 Supreme Court jurisdiction

78-2-3 Repealed

78-2-4 Supreme Court — Rulemaking judges pro tempore and practice of law

78-2-5 Repealed

78-2-6 Appellate court administrator

78-2-7 Repealed

78-2-7.5 Service of sheriff to court

78-2-8 to 78-2-14 Repealed

78-2-1. Number of justices — Terms — Chief justice and associate chief justice — Selection and functions.

(1) The Supreme Court consists of five justices.

(2) A justice of the Supreme Court shall be appointed initially to serve until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a justice of the Supreme Court is ten years and commences on the first Monday in January following the date of election. A justice whose term expires may serve upon request of the Judicial Council until a successor is appointed and qualified.

(3) The justices of the Supreme Court shall elect a chief justice from among the members of the court by a majority vote of all justices. The term of the office of chief justice is four years. The chief justice may serve successive terms. The chief justice may resign from the office of chief justice without resigning from the Supreme Court. The chief justice may be removed from the office of chief justice by a majority vote of all justices of the Supreme Court.

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has duties as provided by law.

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice determines. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice may delegate responsibilities to the associate chief justice as consistent with law.

1990

78-2-1.5, 78-2-1.6. Repealed. 1971, 1981

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction including jurisdiction of interlocutory appeals, over

(a) a judgment of the Court of Appeals,

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals,

(c) discipline of lawyers,

(d) final orders of the Judicial Conduct Commission,

(e) final orders and decrees in formal adjudicative proceedings originating with

(i) the Public Service Commission,

(ii) the State Tax Commission,

(iii) the Board of State Lands and Forestry,

(iv) the Board of Oil, Gas, and Mining, or

(v) the state engineer,

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e),

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution,

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony,

(i) appeals from the district court involving a conviction of a first degree or capital felony, and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

Rule 35. Petition for rehearing.

(a) **Time for filing; contents; answer; oral argument not permitted.** A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. The answer to the petition for rehearing shall be filed within 14 days after the entry of the order requesting the answer, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for an answer.

(b) **Form of petition; length.** The petition shall be in a form prescribed by Rule 27 and copies shall be served and filed as prescribed by Rule 26. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(c) **Action by court if granted.** If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(d) **Untimely or consecutive petitions.** Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

Rule 36. Issuance of remittitur.

(a) **Date of issuance.** The remittitur of the court shall issue 15 days after the entry of the judgment. If a petition for rehearing is timely filed, the remittitur of the court shall issue five days after the entry of the order disposing of the petition. The time for issuance of the remittitur may be stayed, enlarged, or shortened by order of the court. A certified copy of the opinion of the court, any direction as to costs, and the record of the proceedings shall constitute the remittitur.

(b) **Stay, supersedeas or injunction pending review.** A stay or supersedeas of the remittitur or an injunction pending application for review may be granted on motion and for good cause. A motion for a stay of the remittitur or for approval of a supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the court rendering the decision appealed from. A motion for such relief may be made in the reviewing court, but the motion shall show that a motion in the court rendering the decision is not practicable, or that the court rendering the decision has denied such a motion or has failed to afford the relief which the movant requested, with the reasons given by the court rendering the decision for its action. Reasonable notice of the motion shall be given to all parties. The period of the stay, supersedeas or injunction shall be for such time as ordered by the court up to and including the final disposition of the application for review. If the stay, supersedeas, or injunction is granted until the final disposition of the application for review, the party seeking the review shall, within the time permitted for seeking review, file with the clerk of the court which entered the decision sought to be reviewed, a certified copy of the notice of appeal, petition for writ of certiorari, or other application for review, or shall file a certificate that such application for review has been filed. Upon the filing of a copy of an order of the reviewing court dismissing the appeal or denying the petition for a writ of certiorari, the remittitur shall issue immediately. A bond or other security on such terms as the court deems appropriate may be required as a condition to the grant or continuance of relief under this paragraph.

Rule 37. Suggestion of mootness; voluntary dismissal.

(a) **Suggestion of mootness.** It is the duty of each party at all times during the course of an appeal to inform the court of any circumstances which have transpired subsequent to the filing of the appeal which render moot one or more of the issues raised. If a party determines that one or more issues have been rendered moot, the party shall forthwith advise the court by filing a "suggestion of mootness" in the form of a motion under Rule 23. If the parties to the appeal agree as to the mootness of an issue, a stipulation to that effect should be filed, and unless otherwise directed by the court, the appeal will then proceed as to the remaining issues; if all issues in the appeal are mooted and the parties stipulate thereto, the suggestion of mootness shall be presented to the court pursuant to the provisions of paragraph (b) of this rule.

(b) **Voluntary dismissal.** If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs and shall pay whatever fees are due, the clerk shall enter an order of dismissal, unless otherwise directed by the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Rule 38. Substitution of parties.

(a) **Death of a party.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 21. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the trial court or agency but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution shall be effected in accordance with this paragraph. If a party entitled to appeal dies before filing a notice of appeal, the notice of appeal may be filed by the deceased party's personal representative or, if there is no personal representative, by the deceased party's attorney of record. After the notice of appeal is filed, substitution shall be effected in accordance with this paragraph.

(b) **Substitution for other causes.** If substitution of a party is necessary for any reason other than

the jurors that they are the exclusive judges of all questions of fact
(Amended effective Jan 1 1987)

Rule 52 Findings by the court

(a) **Effect** In all actions tried upon the facts without a jury or with an advisory jury the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58A, in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action Requests for findings are not necessary for purposes of review Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b) The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly The motion may be made with a motion for a new trial pursuant to Rule 59 When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact

(1) by default or by failing to appear at the trial,

(2) by consent in writing, filed in the cause,

(3) by oral consent in open court, entered in the minutes

Amended effective Jan 1, 1987)

Rule 53. Masters.

(a) **Appointment and compensation.** Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action in accordance with the provisions of Subdivision (b) of this rule As used in these rules the word "master" includes a referee, an auditor, and an examiner The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct The master shall not retain his report as security for his compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party

(b) **Reference** A reference to a master shall be the exception and not the rule In actions to be tried by a jury a reference shall be made only when the issues are complicated in actions to be tried without a jury save in matters of account a reference shall in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it

(c) **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report Subject to the specifications and limitations stated in the order the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury

(d) **Proceedings.**

(1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys It is the duty of the master to proceed with all reasonable diligence Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45 If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45

(3) **Statement of accounts.** When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be fur-

RECORD CARD

)OD, Lance Conway USP # 18524 SSN 529/90/5377

OBSCIS # 00039165 FPC

)eft, Att. Theft

)-5, 1 yr.

District

10/9/87

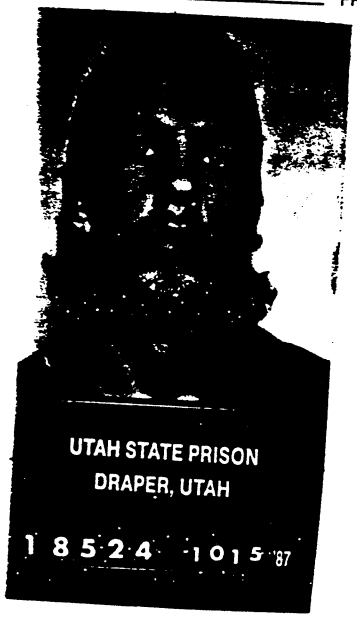
ES & ADDRESSES:

Edward & Joann Wood,

e Dr. Bountiful, Utah

.sty Pearce,

Utah 451-5229



RACE: Cauc AGE: 19 DOB: 3/29/68

MARITAL: Single DEPS:

CITIZEN: US RELIG: LDS

HEIGHT: 6'2" WEIGHT: 160

HAIR: Brn EYES: Brn

COMPLEXION: MEd

MARKS/SCARS: Tattoos: L/ar,-Amy; R/arm-Carole

PREVIOUS ADDRESS(ES):

2335 Elaine Dr. Bountiful, Utah

NOTIFY IN CASE OF EMERGENCY:

Parents, Edward & Joann Wood

EXHIBIT "A"

state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

Rule 35. Petition for rehearing.

(a) **Time for filing; contents; answer; oral argument not permitted.** A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. The answer to the petition for rehearing shall be filed within 14 days after the entry of the order requesting the answer, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for an answer.

(b) **Form of petition; length.** The petition shall be in a form prescribed by Rule 27 and copies shall be served and filed as prescribed by Rule 26. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(c) **Action by court if granted.** If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(d) **Untimely or consecutive petitions.** Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

Rule 36. Issuance of remittitur.

(a) **Date of issuance.** The remittitur of the court shall issue 15 days after the entry of the judgment. If a petition for rehearing is timely filed, the remittitur of the court shall issue five days after the entry of the order disposing of the petition. The time for issuance of the remittitur may be stayed, enlarged, or shortened by order of the court. A certified copy of the opinion of the court, any direction as to costs, and the record of the proceedings shall constitute the remittitur.

(b) **Stay, supersedeas or injunction pending review.** A stay or supersedeas of the remittitur or an injunction pending application for review may be granted on motion and for good cause. A motion for a stay of the remittitur or for approval of a supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the court rendering the decision appealed from. A motion for such relief may be made in the reviewing court, but the motion shall show that a motion in the court rendering the decision is not practicable, or that the court rendering the decision has denied such a motion or has failed to afford the relief which the movant requested, with the reasons given by the court rendering the decision for its action. Reasonable notice of the motion shall be given to all parties. The period of the stay, supersedeas or injunction shall be for such time as ordered by the court up to and including the final disposition of the application for review. If the stay, supersedeas, or injunction is granted until the final disposition of the application for review, the party seeking the review shall, within the time permitted for seeking review, file with the clerk of the court which entered the decision sought to be reviewed, a certified copy of the notice of appeal, petition for writ of certiorari, or other application for review, or shall file a certificate that such application for review has been filed. Upon the filing of a copy of an order of the reviewing court dismissing the appeal or denying the petition for a writ of certiorari, the remittitur shall issue immediately. A bond or other security on such terms as the court deems appropriate may be required as a condition to the grant or continuance of relief under this paragraph.

Rule 37. Suggestion of mootness; voluntary dismissal.

(a) **Suggestion of mootness.** It is the duty of each party at all times during the course of an appeal to inform the court of any circumstances which have transpired subsequent to the filing of the appeal which render moot one or more of the issues raised. If a party determines that one or more issues have been rendered moot, the party shall forthwith advise the court by filing a "suggestion of mootness" in the form of a motion under Rule 23. If the parties to the appeal agree as to the mootness of an issue, a stipulation to that effect should be filed, and unless otherwise directed by the court, the appeal will then proceed as to the remaining issues; if all issues in the appeal are mooted and the parties stipulate thereto, the suggestion of mootness shall be presented to the court pursuant to the provisions of paragraph (b) of this rule.

(b) **Voluntary dismissal.** If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs and shall pay whatever fees are due, the clerk shall enter an order of dismissal, unless otherwise directed by the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Rule 38. Substitution of parties.

(a) **Death of a party.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 21. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the trial court or agency but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution shall be effected in accordance with this paragraph. If a party entitled to appeal dies before filing a notice of appeal, the notice of appeal may be filed by the deceased party's personal representative or, if there is no personal representative, by the deceased party's attorney of record. After the notice of appeal is filed, substitution shall be effected in accordance with this paragraph.

(b) **Substitution for other causes.** If substitution of a party is necessary for any reason other than

RECORD CARD

LTA, Michael A. USP # 15230 SSN 528/17/4512

9W1 OBSCIS # 99990260 FPC

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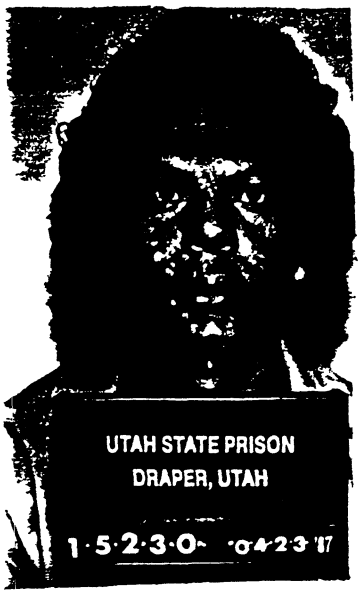
4/17/87
ADDRESSES
lla And Amos
0 N. 500 E.



RACE	Mex	AGE	25 DOB 3/26/62
MARITAL	Divorced	DEPS	
CITIZEN	US	RELIG	Cath
HEIGHT	5'8"	WEIGHT	160
HAIR	Blk	EYES	Brn
COMPLEXION	Med		
MARKS/SCARS	Tattoos: R/shoulder skull with dagger thur it, others		
PREVIOUS ADDRESS(ES)	110 N. 500 E. Salem, Utah		
NOTIFY IN CASE OF EMERGENCY	Parents Stella and Amos Archuleta		

EXHIBIT "B"